PB-250 718

DEVELOPMENT OF A CONTINGENCY PLAN FOR CERTIFICATION OF PESTICIDE APPLICATORS

Environmental Protection Agency
Washington, D. C.

27 June 1975

DISTRIBUTED BY:

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National Technical Information Service
U. S. DEPARTMENT OF COMMERCE

BIBLIOGRAPHIC DATA SHEET	1. Report No.	2.	PB 250 718

4. Title and Subtitle Development of a Contingency Plan for Certification of Pesticide Applicators	5. Report Date 6/27/75 6.
7. Author(s)	8. Performing Organization Rept. No.
9. Performing Organization Name and Address Office of Planning and Management U.S. Environmental Protection Agency 401 M Street, S.W. Washington, D.C. 20460	10. Project/Task/Work Unit No. 11. Contract/Grant No.
12. Sponsoring Organization Name and Address	13. Type of Report & Period Covered 14.

15. Supplementary Notes

16. Abstracts

This report is based on a request to determine when a plan of action should be prepared for EPA to follow if applicators of restricted use pesticides cannot be certified before the legislative deadline. It recommends that EPA delay development of a contingency plan until at least October 1975.

17. Key Words and Document Analysis. 17a. Descriptors

state certification programs
pesticide applicators

17b. Identifiers/Open-Ended Terms

17c. COSATI Field/Group

18. Availability Statement unlimited	19. Security Class (This Report) UNCLASSIFIED	21. No. of Pages 23
	20. Security Class (This Page) UNCLASSIFIED	22. Price $3.50

DEVELOPMENT OF A CONTINGENCY PLAN FOR CERTIFICATION OF PESTICIDE APPLICATORS

I. Introduction

In March 1975, the Program Evaluation Division began the second phase of a comprehensive evaluation of EPA's pesticide programs. One element of the evaluation effort is the preparation of short, operationally relevant papers on issues suggested by the program office. This report is based on a request to determine when a plan of action should be prepared for EPA to follow if applicators of restricted use pesticides cannot be certified before the legislative deadline.

Development of the issue includes the following facts, which are discussed in this section:

- The Federal Environmental Pesticide Control Act of 1972 (FEPCA), which amends the Federal Insecticide, Fungicide, and Rodenticide Act requires the classification of pesticides for general use, restricted use, or both general and restricted use based upon their potential hazards or adverse environmental effects.

- FEPCA requires that after October 21, 1976, certain restricted use pesticides may be applied only by or under the direct supervision of a certified applicator.

A certified applicator is an individual who has been determined to be competent in the use and handling of certain pesticides.

- The Office of Pesticide Programs (OPP) intends to classify a limited number of pesticides for restricted use.

- EPA policy, based upon its understanding of Congressional intent, is that the states are given prime responsibility for the certification and supervision of pesticide applicators. The Agency is responsible for the program standards which the states must meet.

- Some states may not completely implement their certification programs by the deadline.

REQUIREMENT FOR CLASSIFICATION OF PESTICIDES

As a part of the registration review, FEPCA requires EPA to determine the proper classification of a pesticide based on its acute dermal or inhalation toxicity and the circumstances under which it is usually applied. A pesticide will be classified for restricted use if it may cause unreasonable adverse effects on the environment, including injury to the applicator, when applied either according to the directions for use or to widespread and commonly recognized practices.

FEPCA required that within two years after enactment, EPA must have promulgated regulations providing for the registration and classification of pesticides under the provisions of the Act. These section 3 regulations were printed as proposed procedures in the October 16, 1974, Federal Register, and were sent to the Federal Register for final publication on June 26, 1975. Reregistration and reclassification of pesticide products could not begin until these regulations became final.

REQUIREMENT FOR CERTIFICATION OF PESTICIDE APPLICATORS

In order to reduce the number of applicator injuries and environmental problems and to allow the use of toxic pesticides which otherwise would not be registered, FEPCA requires that certain restricted use pesticides may be applied only by or under the direct supervision of a certified applicator (Sec. 3(d)(1)(C). EPA was given one year from enactment to prescribe the standards which applicators had to meet to be certified as competent. These were issued on October 9, 1974, nearly one year late.

Regulations governing submission and approval of state plans for certification were not issued until March 12, 1975. FEPCA requires states desiring to certify applicators to submit a state plan based on those regulations to EPA by October 1975. After approval by EPA, states with acceptable plans can certify applicators within the state.

POLICY FOR CLASSIFICATION OF PESTICIDES

Many pesticide user and manufacturing groups favored a policy of classifying as restricted only those pesticides with acute applicator hazards. Nevertheless, OPP decided on a listing which would include chemicals with adverse effects which could be limited by competent applicators. Pending publication of the section 3 regulations, OPP issued a preliminary list of pesticides almost certain to be classified for restricted use. This list estimated that 10-15% of all pesticide products would be on the final restricted list. Included were a number of high use agricultural chemicals, which effectively extended the number of applicators to be certified to almost all of the nation's 2.5 million farmers.

Based on comments from concerned groups and individuals and a review of the use history of several of the products, OPP has revised the tentative list so that only 6-8% of pesticides are likely to be restricted. The final list is expected to be issued in October 1976.

EPA POLICY IS TO RELY ON STATE CERTIFICATION PROGRAMS

Although it can be justified legally, OPP has announced a policy rejecting a federal certification program. Reasons for rejecting the idea of a federal program include: aversion to the establishment of a new bureaucracy, expectations of local mistrust of federal intervention, lack of funds to manage the program effectively, lack

of agency capability to conduct such a massive program and clear Congressional intent that actual certification should be carried out by the states. This rationale has been described in correspondence with several states and issued to members of the National Association of State Departments of Agriculture. Additionally, the Operations Division expresses the opinion that the existence of a federal program might discourage some states from developing their own program.

Therefore, EPA policy is to rely on state programs to certify applicators of restricted use pesticides. Standards of certification and regulations for state plans have been published in the Federal Register (October 14, 1974, and March 12, 1975, respectively).

REASONS FOR DELAY IN IMPLEMENTATION OF STATE CERTIFICATION PROGRAMS

States have offered at least eight reasons why they may be unable to develop acceptable state plans or certify applicators by the deadlines. They are:

- o EPA regulations on applicator certification were not issued until March 12, five months after they were due. Many states do not like to proceed on the basis of draft regulations.
- o EPA regulations on classification of pesticides, which are a part of the section 3 package, still have not been issued in final form, although they were required by October 1974. Some states maintain that they are unable to prepare proper plans until they know the number of applicators to be certified,

which depends on which pesticides will be restricted. OPP has attempted to solve this problem by issuing draft lists of certain pesticides considered likely candidates to be restricted.

- o Some states lack funds to certify private applicators. States are forecasting large initial costs plus a huge workload if all private applicators are to be certified.
- o States lack time to pass needed legislation. EPA has attempted to eliminate this delay by allowing States to submit plans based on proposed legislation. Such plans may be approved contingent on passage of necessary legislation.
- o States lack time to certify applicators. The time allowed between approval of the submitted plan and the deadline for certification is not long enough in some states with many applicators. Nationwide, there may be as many as 2 million private applicators to be certified.
- o Only limited federal incentives are expected. Federal funding for FY 1975 for training and certification programs will total $2.2 million. EPA is planning to distribute $10.2 million during FY 1976 for similar purposes.
- o Some states are pushing for EPA acceptance of the "sign up" system as a means of determing competence for private applicators.

- o Some states believe that if they do not submit acceptable state plans on time EPA may be forced to set a federal certification program or permit the sign up system, or that the Congress may delete the private applicator from the certification requirements of the Act.

For these reasons, it is possible that at least some of the states will not complete certification by the deadline. The current status of state implementation and an assessment of whether or not certification will be completed by the states will be included in the next section.

WHEN SHOULD EPA DEVELOP A CONTINGENCY PLAN?

Discussion

Faced with the possibility that one or more states will not have an operational certification program, prudent program management must consider when planning should begin to deal with this event. Determination of the most desirable time to develop a contingency plan depends on the appraisal of the following five issues:

- o Will all the states be able to complete certification of applicators?
- o How much of a safety margin is afforded between the deadline and the next major use period for restricted pesticicdes?
- o When will a more precise evaluation of the problems be possible?

- o Will some states delay or discontinue development of certification programs if they learn of a federal contingency plan?
- o Is there enough time to plan and implement an alternative policy?

This section will discuss answers to these questions.

Completion: In order to begin certification of applicators, states must develop legislation and prepare an approvable plan. Many states have not yet passed the requisite enabling legislation. Even without authorizing legislation, states have been encouraged to design certification programs. The legislative deadline for submission of state plans is October 21, 1975, although EPA will continue to accept plans after that date.

Provisions to certify commercial applicators are progressing satisfactorily in most states. Many states have been licensing and examining some categories of commercial applicators for several years. Thus, the addition of a further licensing requirement for commerical applicators has not been controversial. Several states do have problems with the requirements for certification of private applicators. These states either want farmers exempted from certification (Colorado and Utah) or propose a registration or "sign up" system rather than a testing system to indicate competence (Alabama, Illinois, Minnesota and Missouri). Some state opposition appears to be a delaying tactic until it is clear that the requirement

for private applicator certification will not be reduced or repealed. The Operations Division believes that all these problems can be resolved in time to certify applicators. OD bases it optimism on indications that several key states which publicly voice opposition to private applicator certification are quietly going about preparing for certification. Once these states formally submit approvable state plans it is expected that other states will follow suit. Nevertheless, given all the potential problems, it is likely that one or more states will not submit an approvable plan or complete certification of all of its applicators by October 21, 1976. Certainly no guarantee of complete success can be offered.

Safety Margin: We believe that most pesticides which will be classified for restricted use are applied after the winter season in most areas of the country. (In some southern states the first pesticides are applied as early as January.) For example, only one pre-emergent herbicide appears on the Registration Division's interim list of restricted use pesticides. Since pre-emergents are the first pesticides to be use, there is some indication that most restricted use pesticides will be applied later in the growing season. To the extent that this is true, many states have the six from October 1976 to April 1977 to complete certification, since the law requires applicators to be certified prior to use, not prior to a fixed date.

Problem Evaluation: It is not possible at this time to evaluate

the likely extent of state inability or unwillingness to certify applicators. States without needed authorization have legislatures meeting now, scheduled to meet later this year, or that can be called into special session. Because EPA's regulations were late, state plans are just beginning to be drafted, even though the deadline is only four months away. The Operations Division and the Regional Offices are working with states to develop acceptable plans, but it is clearly too early to determine whether all states will be successful. By October 1975, when acceptable state plans are due to be submitted to EPA, a more precise evaluation of the situation should be possible. At that time, several states should have completed acceptable plans and others will have submitted tentative plans which require additional work. It is possible that some states may have taken no action. Thus, even though complete information cannot be guaranteed, enough will be known about state intentions to define the actions EPA could consider.

Effects of Contingency Plan: The preparation of a contingency plan is good management practice. The adverse impact which a contingency plan could have depends on when it is issued and what it includes. For example, a contingency plan based solely on a federal certification program for all states could discourage states with limited resources from dispersing them on a program that the federal government is apparently prepared to operate. Any contingency plan limited to this solution and announced at this time could bring about the situation it was designed to deal with. This could have a catastrophic effect on the policy of encouraging state programs.

The Operations Division believes that although contingency planning may be necessary, such a plan should be carefully considered because of its possible adverse effects.

We do not accept the contention that deleterious consequences would necessarily result from contingency planning. Instead, we maintain that the consequences of not planning for the possiblity that some states may not certify applicators may be worse than the hypothetical impact such planning might have. Also, we do not accept the idea that discussions of a federal contingency plan will inevitably discourage states from planning their own programs. Some regional offices have already held such discussions with states. No cessation of planning has resulted.

Time Required to Implement Alternative Policy: To be useful, any contingency plan must be completed while there is still time to implement the recommended policy. This section discusses the alternative policies which we think EPA could possibly follow if states do not implement certification programs. The range of alternatives include:

- doing nothing
- taking enforcement action
- taking other legal action
- using commercial applicators
- implementing a federal certification program
- using applicators from other states
- providing interim federal certification
- repealing the private applicator requirements
- modifying the section 4 regulations.

A. Do Nothing

The Agency could elect to do nothing in the event that some states have no certified applicator program by the deadline. Three scenarios could follow from this option.

(1) EPA could be sued to enforce the provisions of the law. If the court finds that certification is entirely a state responsibility, EPA would be enjoined to prosecute dealers selling restricted use pesticides to uncertified applicators and uncertified applicators who obtain and use these same products. Although Agency enforcement actions would be legitimized by the court decision, from a logistical standpoint the ruling would not be easy to implement and the ramifications could be undesirable (see enforcement alternative).

(2) If the Agency is sued and the court determines that FEPCA requires a federal certification alternative for states without their own plans, EPA would be faced with organizing and executing a major program. Setting up the system on short notice would be a burden on EPA and would probably result in a less than rigorous and effective program in the first and most important year.

(3) It is possible that no legal action would be initiated if EPA ignored restricted pesticide use violations. In this case further effort to convince states to implement a program would probably not be successful without some threat of enforcement. How long states with programs would continue to certify applicators

if nothing is done to states without them is unknown, but ultimately the whole program could deteriorate.

None of these outcomes is particularly desirable. The consequences of inaction are that EPA will probably end up being told what to do either by the courts or perhaps Congress. This reflects poorly on the Agency's ability to carry out its mission. The public credibility of EPA as an effective regulatory body would be lowered and relations with states who have worked hard to comply would be jeopardized. We think that doing nothing is justified only if only one or two states have not complied. In this circumstance a temporary delay, with the threat of future enforcement action, may get the noncomplying state to fall in line. For more than two states, this choice is practically and politically impossible.

B. Enforcement

If some states have made no provisions to certify applicators by October 1976, EPA could defend an enforcement policy. The law clearly states that after October 21, 1976, restricted use pesticides can be applied only by or under the direct supervision of a certified applicator. Strict enforcement would mean that EPA would deny restricted use pesticides to those states.

States are maintaining that it would be neither practical nor cost-effective for the Agency to prosecute pesticide use violations for three reasons. First, national food supply could be adversely affected if essential pesticides were prohibited. Second, farmers denied restricted pesticides would be severely affected relative to farmers in other states. Third, enforcement would be extremely difficult.

Apparently, several states are delaying development of plans because they believe that these ramifications would be unacceptable to EPA, to Congress, or to both. They expect legislative changes.

Our assessment of these arguments is that they make more political sense than economic. Use of unrestricted pesticides could at least reduce the adverse impact on food supply and farmers' competitive position. In this way denying the use of restricted pesticides could have the benefit of encouraging use of safer alternatives. In all three cases the problem is similar to that raised by the cancellation of a pesticide registration, yet this regulatory authority has not proved unworkable.

Another argument raised against strict enforcement is that it was not the intent of Congress to prohibit use of certain toxic pesticides in certain states. Rather, the intent was to train and certify applicators as being competent to handle these materials. Consequently, the argument goes, EPA should not deny use of these pesticides by strictly enforcing the law. In the event that EPA chose the enforcement option, a farmers' or manufacturers' group would probably sue EPA to offer a federal certification program which would allow use of restricted pesticides. Strict enforcement could thus force EPA to adopt the federal certification policy it has explicitly rejected.

EPA policy has been that enforcement would not be a practical way of achieving program goals. In fact, enforcement itself is a misnomer, since EPA is much more concerned with compliance than convictions. Enforcement is primarily composed of a set of administrative procedures designed to get states to develop approvable

certification programs on the one hand and to get farmers certified by these state programs on the other. Before any prosecution against an individual private applicator is taken, EPA would prefer making every attempt to encourage the farmer to become certified. This entire policy is based on the concept that to use restricted use pesticides is a privilege, not a right. The most efficient enforcement tool would thus be to revoke certification, denying the farmer the privilege of using restricted pesticides.

Enforcement in many states without applicator certification programs would not be practical. As long as the statute itself and the regulatory thrust based on it stay unchanged, EPA would have to say that restricted use pesticides are denied to uncertified applicators. However, it is our opinion that this position would never be upheld. Congress, would be subject to immediate political pressure from affected states, and would undoubtedly not allow strict enforcement. The probable outcome would be to exempt private applicators from the certification requirement, an event which has much support in Congress and the farming community already.

The strength of the case against EPA enforcement declines as the number of states with certification programs increases. If fewer than 10 states are unable or unwilling to implement programs, then the enforcement option is at least credible and is probably desirable as well. At the same time political pressure from farmers might encourage state program development. Politically, it would be difficult for only a few states to argue that the requirements were unreasonable if the great majority of states were able to comply.

In summary, we feel that EPA could use the threat of enforcement as a tool to encourage a small number of states to complete certification. However, If many states do not certify applicators, it would not be practical for EPA to deny restricted pesticides in those states. In states with operating certification programs, enforcement would be tool to encourage compliance, not convict farmers.

C. EPA Legal Action

In FY's 1975 and 1976 EPA will be providing states with $3 to $4 million in certification assistance. If a state has accepted its share of the money but is not making satisfactory progress toward implementing its certification program, EPA may be able to take legal action to get the state to comply. At least this would force a state to make a specific commitment. Receipt of the money would be a pledge to meet the requirements, whereas rejection indicates some other alternatives are necessary. Any such lawsuits by EPA are dependent upon a decision from OGC that the action is both proper and wise. Realistically, a more likely threat along the same lines would be to withhold the funds and hope that this action would goad the affected states into progress.

D. Commercial Applicators

All states are apparently satisfactorily progressing with plans to certify commercial applicators. In those states which do not end up with a certification program for private applicators, commercial applicators can be hired to apply necessary restricted use pesticides. The primary disadvantages of this alternative are that there may not be enough commercial applicators to handle the private workload, and many farmers may not be able to afford

the expense of paying someone else to do the job. For these reasons this approach is not a suitable long term solution to the problem of no private applicator certification. However, utilization of commercial applicators would minimize the short term hardships associated with denying restricted use pesticides to anyone who is not certified.

E. Federal Certification

A thorough federal certification program is the most frequently mentioned alternative to enforcement. Designing, organizing, and carrying out a comprehensive federal certification program would be a difficult task. A written exam would be the simplest basis for determining competency. Although a wealth of potential test material already exists, selection of effective, meaningful questions to keep the exam from being too easy or too hard could take several months.

EPA has no field mechanism for implementing a federal plan, so the Agency would be forced to rely on other federal departments to complete or assist in performing the necessary tasks. Locations and times for administering the tests must be chosen to ensure that all potential applicants have sufficient access. Perhaps this could be accomplished through the Civil Service Commission, which organizes thousands of qualifications tests each year, or through the Cooperative Extension Service, which has agents in almost every U.S. county. The machinery for grading the exams and issuing the certification must also be set up, and adequate security controls arranged. In order to finance the program a special appropriations request will have to be made of Congress.

We believe that in spite of the complexity involved, all of these activities can be completed within twelve to fifteen months, so that October 1975 is not too late to begin, if the job is to be finished by October 1976. What must be emphasized is that preparation for federal certification is a very serious business. It should be started only if EPA is committed and able to make a realistic program. Federal certification planning could easily backfire. Many states will quit working on their own programs if they think EPA cannot actually implement a strong federal alternative. On the other hand, a viable federal program would probably convince many states to complete their own arrangements in order to avoid possibly stricter federal intervention.

Because of the cost and bureaucratic burden, establishment of a federal certification system is not a particularly attractive prospect. However, there may be no other choice. The House and Senate Committee Reports, which discussed the proposed FIFRA amendments, each assert that section 4 permits either State or federal certification programs. The legislation has been interpreted by OGC to say that EPA does the have the authority to provide a certification alternative where a state program is lacking.

F. Interstate Cooperation

An applicator in a state without a certification program could be certified in a neighboring state and then be allowed to apply restricted

use pesticides in his home state. Alternatively, commercial applicators from one state could be hired to make applications of restricted use pesticides in a state with no certification procedure. While these kinds of options satisfy the spirit of the law, they would not be appreciated by many of the participants. Applicants will not be happy about having to deal with another state in order to use restricted use pesticides. States with programs may refuse to to certify applicators from states without programs. All in all, this alternative is probably not very feasible.

G. Interim Federal Certification

The Agency could organize an interim federal certification system to provide a backstop until a state program could be implemented. For example, an applicant could be sent a pamphlet briefly describing the important aspects of handling pesticides. He would return a signed affidavit attesting that the material had been read and responsibility for use was being accepted. This type of program could be organized relatively quickly and at a fairly low cost. Although the benefits of interim certification would presumably be less than full certification, one additional advantage is that the program could be delegated to the state. Theoretically few states would be involved and most of the work would be done through the mail. The only major problem is making the initial contact with all potential applicants.

H. Congressional Appeal

Because of the delay in promulgating the section 4 regulations and the lack of sufficient funding, a large number of states may not be able to implement a certification program by October 1976. If temporary

procedural difficulties are the main cause of state failures then, asking Congress to extend the deadlines would be justified and desirable. At the recent FIFRA authorization hearings held by the House Agriculture Committee, John Quarles stated that EPA is amenable to preparing a special report to Congress next April assessing the certification situation. At that time EPA could request an extension if many states were making progress, but were still behind in their implementation efforts. However, if the problem is unwillingness to cooperate then an additional time period for compliance, without any change in the basic legislation, is unlikely to be very helpful. Congress could be petitioned to delete farmers from the certification requirement, but this is not a recommended approach. EPA has supported farmer certification from the onset and it is now too late to reverse this position and maintain credibility.

I. Modification of Regulations and Restrictions

As discussed in the introduction, the number of restricted use pesticides influences the number of applicators needing certification. Therefore, significant narrowing of the restricted use category to include only extremely dangerous products might be a reasonable option. If only those pesticides having a history of frequent involvement in accidents were restricted, the number of affected farmers might be small enough that states would no longer consider certification burdensome. This option requires immediate action if it is to be effective. The Registration Division would soon have to complete a definitive classification of restricted use products. Given the current status of the section 3 regulations, this may not be possible.

Another option would be to modify the standards for determing farmer competency in order to increase their acceptability. For the most part the requirements are already so flexible that this option is unrealistic unless the purpose of the Act is to be subverted. One modification that might be considered is allowing a farmer to purchase pesticides from a registered dealer if he signs a statement that he has read the label and will follow its directions. This type of "sign-up" system has been suggested by several states as cheaper to operate and more practical. We note that this concept could approach the "oral test" already allowed by the regulations. If this change is made soon, states with similar programs (like Minnesota) might be encouraged to submit plans.

Based on our interpretation of the necessary elements of each of these alternatives, we conclude that enough time exists between October 1975 and October 1976 to plan and implement the chosen alternative for use in those states without programs. The only alternative which would require immediate action is a reduction in the list of pesticides to be restricted. However, the Registration Division maintains that much work must be completed before a definitive list can be prepared. If this is the case, then pursuing this alternative now is unlikely to be productive.

OPTIONS

- Option 1: Develop the contingency plan now.

  Contingency planning should begin immediately if it becomes known that:

  - any state will not finish certifying applicators

within a reasonable time after the October 21, 1976 deadline; and

- much time is needed to select the most desirable alternative for dealing with this eventuality and to prepare for appropriate implementation.

On the basis of the preceeding discussion, we believe that Option 1 is not warranted. Although the states are apparently making some progress in passing legislation and developing plans, we are convinced that not all the states will complete the plans by October 1975. However, we believe a decision to begin immediate preparation of a contingency plan would be premature, since a better determination of the scope of the problem is necessary before a realistic contingency plan can be completed. In addition, the possible negative effect which a federal plan could have on state efforts would not be outweighted by the benefits of early development of alternatives. Our opinion is that the necessary planning and implementation of an alternative policy could be completed within one year, so we conclude that there is no reason to begin immediate contingency plan development.

o Option 2: Delay development of a contingency plan at least until October 1975.

Congtingency planning should be delayed if:

- the additional information available in October 1975, when state plans are due for EPA approval, will allow a better determination of the need for a contingency plan; and

- there is enough time remaining between October 1975 and October 1976 to develop and implement an acceptable plan.

We have previously commented on the effects of late regulations and the lack of an established policy. Now that EPA has stated clearly that we will rely on state certification, we should not change this policy. Hopefully, this will reduce the negative effects of past indecision. By October 1975, EPA may know which states do not intend to submit plans to certify applicators. Based on this specific information, EPA will be in a better position to evaluate the problem. If a contingency plan is needed, it could be developed and selected alternatives implemented before October 1976. This option also has the advantage of postponing notification of a federal plan until after the states become committed to a course of action, which may reduce the possibility of some states stopping work on their plans and programs.

o Option 3: Reject development of a contingency plan.

Contingency planning is unnecessary <u>if</u>:

- all states will certify pesticide applicators within a reasonable time after October 1976.

We do not believe that no consideration should be given to developing a contingency plan. In our opinion the likelihood of some states not having certification programs is too high to warrant this option.

<u>RECOMMENDATION</u>:

We recommend Option 2, delay development of a contingency plan at least until October 1975.